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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re

FEDERICO GUTIERREZ AND MARIA
GUTIERREZ,

Debtor(s).

Case No. 10-14987-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

WELLS FARGO BANK, NA,

Movant,

vs.

FEDERICO GUTIERREZ AND MARIA
GUTIERREZ, Debtor(s); BETH MAXWELL
STRATTON, Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(2)

DATE: June 22, 2010
TIME: 1:30 p.m.
CTRM: 11

2500 Tulare Street,
Fresno, CA 93721-1318

Wells Fargo Bank, NA¹ ("Movant"), moves this court for an order terminating the automatic stay of
11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to

¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 enforce its security interest in real property generally described as 832 U Street, Merced, California
2 95340.

3 On or about May 5, 2010, Federico Gutierrez and Maria Gutierrez ("Debtors") filed a
4 voluntary petition under Chapter 7 of the Bankruptcy Code, and Beth Maxwell Stratton was
5 appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against
6 Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

7 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I.**

10 **MOVANT IS ENTITLED TO RELIEF FROM THE**
11 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

12 **NO EQUITY**

13 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
14 debtor does not have any equity in the property and the property is not necessary to the debtor's
15 effective reorganization.

16 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
17 § 362(d)(2) reflects congressional intent to allow creditors to
18 immediately proceed against the property where the debtor has no
19 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

20 Id. at 610 (emphasis added).

21 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
22 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
23 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from
24 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
25 1984).

26 An appropriate cost of sale factor should also be added to determine if the debtor has any
27 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
28 (Bankr. S.D. Cal. 1982).

1 On or about April 10, 2006, Debtors, for valuable consideration, made, executed and
2 delivered to Movant a Note in the principal sum of \$175,000.00 (the "Note"). Pursuant to the Note,
3 Debtors are obligated to make monthly principal and interest payments commencing June 1, 2006,
4 and continuing until May 1, 2036, when all outstanding amounts are due and payable. The Note
5 provides that, in the event of default, the holder of the Note has the option of declaring all unpaid
6 sums immediately due and payable. A true and correct copy of the Note is attached to the
7 concurrently served and filed Exhibits to the Declaration in Support of Motion for Relief From
8 Automatic Stay ("Exhibits") as exhibit A and incorporated herein by reference.

9 On or about April 10, 2006, the Debtors made, executed and delivered to Movant a Deed of
10 Trust (the "Deed of Trust") granting Movant a security interest in real property commonly described
11 as 832 U Street, Merced, California 95340 (the "Real Property"), which is more fully described in
12 the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as a result of
13 the Debtors' bankruptcy case may be included in the outstanding balance under the Note. The Deed
14 of Trust was recorded on April 19, 2006, in the Official Records of Merced County, State of
15 California. A true and correct copy of the Deed of Trust is attached to the Exhibits as exhibit B and
16 incorporated herein by reference.

17 The obligation under the Note is in default as of March 1, 2010, for failure to make payments
18 to Movant. As of May 13, 2010, the total obligation due and owing under the Note is in the
19 approximate amount of \$163,441.66, representing the principal balance of \$161,481.76, interest in
20 the sum of \$2,797.87, late charge in the amount of \$106.34, escrow advances in the amount of \$6.00,
21 and other charges of \$45.00, less a suspense in the amount of \$995.31. This is an approximate
22 amount for purposes of this Motion only, and should not be relied upon as such to pay off the subject
23 loan as interest and additional advances may come due subsequent to the filing of the Motion. An
24 exact payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred
25 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total
26 arrears under the Note are in the approximate sum of \$3,347.30, excluding the post-petition
27 attorneys' fees and costs incurred in filing the instant Motion.

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1 II.

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
5 Statements, the fair market value of the Property is approximately \$50,000.00. True and correct
6 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as
7 exhibit C and incorporated herein by reference.

8 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$50,000.00
Less:	
Movant's Trust Deed	\$163,441.66
Costs of Sale (8%)	<u>\$4,000.00</u>
Equity in the Property:	\$<117,441.66>

12
13 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
14 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
15 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

16 III.

17 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

18 **CAUSE - LACK OF ADEQUATE PROTECTION**

19
20 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
21 protection of its interest in the Property.

22 Movant submits that adequate protection in this case requires normal and periodic cash
23 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
24 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

25 Movant is informed and believes that Debtors are presently unwilling or unable to provide
26 adequate protection to the Movant and there is no probability that adequate protection can be
27 afforded to Movant within a reasonable time.

28 /././

1 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
2 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

3 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

4 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
5 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

6 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

7 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
8 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
9 the Property;

10 4. Permitting Movant to offer and provide Debtors with information re: a potential
11 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
12 Mitigation Agreement, and to enter into such agreement with Debtors;

13 5. Alternatively, in the event this court declines to grant Movant the relief requested
14 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
15 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust and all
16 other deeds of trust encumbering the Real Property, including Debtors' obligations to pay when due (a) the
17 monthly installments of principal and interest, as required under the Note; (b) tax/insurance obligations; and
18 (c) any sums advanced by Movant on behalf of Debtors in order to protect Movant's interest in the Real
19 Property, including all attorneys' fees and costs incurred in the filing of this motion;

20 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
21 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law; and

22 7. For such other and further relief as the court deems just and proper.

23 Dated: May 26, 2010

PITE DUNCAN, LLP

24 /s/Joseph C. Delmotte (CA SBN 259460)

25 JOSEPH C. DELMOTTE

Attorneys for WELLS FARGO BANK, NA